Supreme Court, U.S.
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No. 99-405

IN THE

Supreme Court of the United States

LUCIAN HUNTER HAY,

Petitioner,

v.

EVIN WARD EVINS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS EVIN W. EVINS, TRACYE FRYE HOPPER, ROB McCOY, JOHN PHILLIPS, BILL READ, MARCI SENN, TERRY SMITHER AND JENNIFER VEST

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STATEMENT OF THE CASE

Petitioner, Lucian Hunter Hay, is the former elected jailer for the Franklin County Regional Jail in Kentucky. In two separate 1995 state trials, juries convicted him of three counts of theft by deception, one count of intimidating a witness, two counts of rape, two counts of attempted rape, one count of sodomy, and six counts of sexual abuse, all based upon Petitioner's conduct during his tenure as jailer.

Petitioner was transferred to Orient Correctional Institute where he currently is incarcerated. On April 1, 1995, Petitioner, acting pro se, filed a federal lawsuit against thirty-one defendants. The named defendants represented a mixture of government employees and private individuals. Petitioner's complaint and his first amended complaint filed on April 22, 1996, set forth numerous causes of action pursuant to 42 U.S.C. §§ 1983, 1985(1)-(3), and 1986, and *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Essentially, Petitioner alleged that he was the victim of an elaborate conspiracy orchestrated by Governor Paul Patton, a Democrat, and his supporters, aimed at undermining his ability to aid Patton's Republican opposition in the 1995 governor's race. The defendants, including members of the Federal Bureau of Investigation and a United States Attorney, allegedly participated in the conspiracy in order to have criminal charges brought against him. One defendant, Franklin County Judge/Executive Bob Arnold, was a close friend and political supporter of Governor Patton. Petitioner claims that Arnold was promised a lucrative appointment if Patton won the governor's race.

Petitioner alleged that Arnold knew that Hay was very popular in Franklin County and planned to run for County

Judge/Executive in the next election. Arnold allegedly sought to have Petitioner removed from his office as county jailer to weaken his political standing thereby undermining his ability to support Patton's opponent and challenge Arnold for the position of Franklin County Judge/Executive. Arnold allegedly pursued this plan by using his influence in the Patton campaign and the power of his office to promise jobs in exchange for assistance in helping to set up Petitioner on criminal charges.

Petitioner filed an application to proceed in forma pauperis ("IFP") on February 12, 1996, but initially he was denied IFP status. On August 5, 1996, however, after Petitioner paid the filing fee, the district court granted IFP status to Hay, waiving further costs. Petitioner's complaint and amended complaint were deemed filed as of the entry date of the order granting Hay in forma pauperis status.

On August 30, 1996, Petitioner tendered a second amended complaint that recited claims based upon the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1951-1968. Hay based his RICO claims upon allegations that defendants conspired to have the criminal charges brought against him in order to get him out of office. He offered the same explanations for the formation of this conspiracy, namely, his intention to run for Franklin County Judge/Executive and his support for Governor Patton's Republican opposition. Petitioner also alleged that the conspiracy was a result of his lobbying efforts to defeat a juvenile justice bill and Class "D" Felon bill then pending in the Kentucky legislature.

The case was reviewed by Magistrate Judge James B. Todd who, in a thorough Report and Recommendation consisting of eighty-seven pages, advised the U.S. District Court for the Eastern District of Kentucky to dismiss Petitioner's lawsuit and deny his motion to file a second amended complaint. The Magistrate Judge concluded that Hay failed to state a claim as to any of his causes of actions.

The district court adopted the Report and Recommendation as its opinion, denied Petitioner's motion for leave to file a second amended complaint, and *sua sponte* dismissed the case with prejudice. The district court further certified in the order that any appeal would not be taken in good faith.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit which, in a majority decision, affirmed the district court's dismissal. Hay then filed a petition for rehearing en banc in which he claimed that the Sixth Circuit panel may have let its decision be influenced by Petitioner's criminal charges and convictions. The Sixth Circuit denied his petition, and subsequently, Hay filed the petition for a writ of certiorari presently before this Honorable Court.

REASONS FOR DENYING THE WRIT

I.

MATTERS NOT PROPERLY BEFORE THIS HONORABLE COURT ARE ORDINARILY NOT CONSIDERED

A. In The Proceedings Below, Petitioner Failed To Argue That 28 U.S.C. § 1915(e)(2)(B)(ii) Discriminates Against Indigent Pro Se Litigants In Violation Of The Constitution

28 U.S.C. § 1915(e)(2)(B)(ii) is a relatively new provision of the Prison Litigation Reform Act of 1995 ("PLRA") signed into law by President Clinton on April 26, 1996. This particular provision of the Act, the constitutionality of which Petitioner seeks to address now for the first time, provides as follows:

> (e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that —
>
> (A) the allegation of poverty is untrue; or
>
> (B) the action or appeal —
>
> (i) is frivolous or malicious;
>
> (ii) fails to state a claim on which relief may be granted; or

> (iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915(e)(2).

The provision mandates that the court screen actions brought by all litigants proceeding in forma pauperis regardless of whether the plaintiff is a prisoner, represented by counsel, or proceeding pro se as is Petitioner in this case. *See McGore v. Wrigglesworth*, 114 F.3d 601, 608 (6th Cir. 1997) (comparing provision with § 1915A and finding that "§ 1915(e)(2) is restricted neither to actions brought by prisoners, nor to cases involving government defendants.").

Although Petitioner has expressed his discontent with the court's dismissal of his lawsuit pursuant to the revised in forma pauperis provisions of the PLRA, Hay never challenged the statute on equal protection or due process grounds in any of the proceedings below. Thus, Petitioner's argument that § 1915(e)(2)(B)(ii) discriminates against indigent pro se litigants is not properly before this Court.

Despite this Court's authority to review matters not raised below, *see Carlson v. Green*, 446 U.S. 14, 17, n.2 (1980), it will choose to do so only in exceptional cases. *Lawn v. United States*, 355 U.S. 339, 362, n.16 (1958). "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970); *see also Berkemer v. McCarty*, 468 U.S. 420, 443 (1984).

In the proceedings below, Petitioner had more than one opportunity to challenge § 1915(e)(2) on constitutional grounds, but failed to do so. Because this case presents no extraordinary circumstances which might otherwise compel this Court to exercise jurisdiction, the revised statute should be reviewed, if at all, only after one of the circuit courts has had the opportunity to decide the matter after thorough consideration.

II.

DISMISSAL OF PETITIONER'S COMPLAINT *SUA SPONTE* UNDER 28 U.S.C. § 1915(e)(2) DID NOT IMPERMISSIBLY IMPAIR PETITIONER'S RIGHTS

A. The New Dismissal Provision Under 28 U.S.C. § 1915(e)(2) Is Merely A Procedural Change

Petitioner argues that the application of 28 U.S.C. § 1915(e)(2), *supra*, impermissibly impaired his "rights" to proceed with his federal lawsuit. Specifically, Hay contends that the district court erroneously applied the revised in forma pauperis statute to his case retroactively, contrary to this Court's instruction in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

Landgraf provided federal courts with a blueprint to assist them in determining whether a newly enacted or revised statute should be applied to pending cases. In *Landgraf*, this Court indicated that the first step in assessing a statute's retroactivity is to consult its text. If the statute prescribes its proper reach, then congressional instruction controls. *Id.* at 280. If the statute is silent or ambiguous, then the court must evaluate the legislative history of the

Act to discern whether Congress intended the legislation to reach cases pending prior to its effective date. *Id.* at 262. If neither the text nor the legislative history of the statute are dispositive, then judicial default dictates that the court must decide whether the law will be applied retroactively. *Id.* at 280.

According to this Court, a judicial evaluation to determine whether a statute should be applied retroactively includes an evaluation of the following factors: (1) whether it would impair rights a party possessed when he acted; (2) increase a party's liability for past conduct; or (3) impose new duties with respect to transactions already completed. *Landgraf*, 511 U.S. at 280. A provision has an impermissible retroactive effect if it "attaches new legal consequences to events completed before its enactment." *Id.* at 269-270.

Because neither the language nor the history of the PLRA has provided much guidance regarding the temporal reach of the PLRA, various circuits have been forced to decide whether the Act's provisions should be applied to cases pending prior to April 26, 1996. The Sixth Circuit, which reviews statutory provisions separately to determine whether retroactive application is proper, *see Wright v. Morris*, 111 F.3d 414, 418 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 263 (1997), correctly determined that § 1915(e)(2) applies to cases that were pending when the provision became effective.

The Sixth Circuit explained that § 1915(e)(2) changed the circumstances under which an in forma pauperis case is to be dismissed. Whereas its predecessor left dismissal to the discretion of the court when a complaint was frivolous or malicious or the allegations of poverty by the plaintiff were untrue, the court now has no choice but to dismiss a

case if the plaintiff presents false allegations of poverty, the complaint is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from defendants who are immune from relief. § 1915(e)(2). Although the revised statute provides different screening devices than contained in former § 1915(d), the court below correctly pointed out that its retroactive application to Petitioner's case does not have an impermissible retroactive effect under *Landgraf*, explaining:

> First, even absent the PLRA, a district court has the power to *sua sponte* dismiss a case on the merits, but in doing so it must, *inter alia*, notify the parties of its intent to dismiss and allow the plaintiff an opportunity to either amend his complaint or respond to the district court's rationale for dismissal. Second, plaintiff would not necessarily have been able to amend his complaint in response to a Rule 12(b)(6) motion by defendant. Although this circuit adheres to a policy of "liberality in allowing amendments to a complaint," we have held that a district court may deny a motion to amend where, as here, the court finds that the proposed changes are futile, i.e., destined to fail.

(Opinion, Petition 11a).

The court below concluded that the revisions to former § 1915(d) were merely procedural rules which "regulate secondary rather than primary conduct." (Opinion, Petition 10a). This point deserves emphasis because its effect defeats Petitioner's argument that his "rights" have been impaired by retroactive application of the PLRA. On the contrary, the

district court could have dismissed Petitioner's claim *sua sponte* for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) if it determined that the allegations of the complaint were totally implausible, attenuated, unsubstantial, frivolous, devoid of merit, or no longer open to discussion. *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974).

Equally important is the fact that Petitioner's amended complaint was deemed filed and his in forma pauperis status granted by the district court's order on August 5, 1996, after Hay paid the filing fee and more than three months after the PLRA went into effect. Thus, Hay was a prisoner proceeding in forma pauperis when the district court subsequently dismissed his lawsuit under § 1915(e)(2)(B)(ii). The revised statute contemplates an on-going screening process once in forma pauperis status is conferred as evidenced by the provision's opening language, "*Notwithstanding any filing fee, or any portion thereof, that may have been paid*, the court shall dismiss the case *at any time* if the court determines that —" § 1915(e)(2) (emphasis added).

Thus, Hay's rationale for seeking this Court's review is mistaken. The opportunity to amend his complaint prior to dismissal was never a "right" as he claims. To the extent that the Sixth Circuit provides for notice and an opportunity for the plaintiff to amend his complaint prior to dismissal, *see Tingler v. Marshall*, 716 F.2d 1109, 1112 (6th Cir. 1983), such is not the practice when a litigant is proceeding in forma pauperis and therefore, is subject to the screening process of § 1915(e)(2). As the Sixth Circuit stated in *McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997):

> Under the Prison Litigation Reform Act, courts have no discretion in permitting a plaintiff to

> amend a complaint to avoid a sua sponte dismissal. If a complaint falls within the requirements of § 1915(e)(2) when filed, the district court should sua sponte dismiss the complaint.

Id. at 612. *See also Benson v. O'Brian*, 179 F.3d 1014, 1016 (6th Cir. 1999) (explaining that to the extent § 1915(e)(2) is applicable in a particular case, the notice and opportunity to amend prior to dismissal mandated by *Tingler*, is overruled).

The Sixth Circuit's conclusion regarding the retroactive application of § 1915(e)(2) was based on a thorough analysis using this Court's instructions in *Landgraf*. Petitioner has failed to demonstrate any errors allegedly committed by the court below, but rather seeks review by this Court in order to present his same argument one more time.

B. Dismissal Of Petitioner's Complaint Was Proper Because The PLRA Mandated Dismissal

Once the district court determined that § 1915(e)(2) applied to Petitioner's case, and that Hay's complaint failed to state a claim upon which relief could be granted, dismissal was mandated pursuant to that provision of the PLRA. The statute unambiguously states that the court "shall" dismiss the action thereby preventing the court from exercising its discretion. § 1915(e)(2).

The majority decision in the court below affirmed the dismissal of all of Petitioner's claims, stating, "We agree for the reasons stated by the magistrate judge in his exhaustive Report and Recommendation that plaintiff's allegations fall far short of required pleading standards."

(Opinion, Petition 13a). These Respondents also find it difficult to submit reasoning any better than that of the magistrate judge in this case, especially since the "claims" against the thirty-one defendants named in Petitioner's complaint were entangled and virtually impossible to identify.[1]

Although the Federal Rules of Civil Procedure do not require a litigant to file a perfect pleading, they do require that a complaint give sufficient notice to each defendant as to the claim(s) being alleged against him or her and the relief sought by the plaintiff. Fed. R. Civ. P. 8. Conclusory allegations and statements which require the parties or the court to "conjure up unpled allegations" are insufficient. *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989); *see also O'Hara v. Wigginton*, 24 F.3d 823, 827 (6th Cir. 1994); and *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

Furthermore, any claim of right to file a second amended complaint as Petitioner has argued is without merit given the unambiguous language of Fed. R. Civ. P. 15(a). Although Petitioner has alleged that his second amended complaint clearly set forth valid RICO claims, whether a party will be granted leave to file a second amended pleading is within the sole discretion of the court. Fed. R. Civ. P. 15(a). Moreover, once the district court determined that the original complaint as amended was subject to dismissal *sua sponte* under § 1915(e)(2), it had no other choice but to deny a second motion to amend. *McGore*, 114 F.3d at 612.

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1. For example, Petitioner claimed that District Court Judge Joseph Hood, the presiding judge at a prior unspecified trial, improperly refused two requests for an investigation into Hay's allegations of perjury by witnesses. However, Judge Hood was not named as a defendant to the present action.

III.

PETITIONER HAS ABANDONED THE ISSUE OF WHETHER POLITICALLY MOTIVATED CONSPIRACIES ARE PROHIBITED UNDER 28 U.S.C. § 1985(3) IN LIGHT OF *BRAY v. ALEXANDRIA WOMEN'S HEALTH CLINIC*, 506 U.S. 263 (1993).

Supreme Court Rule 14 governs the required content of a petition for writ of certiorari. The petition must set forth "[a] direct and concise argument amplifying the reasons relied on for allowance of the writ." Sup. Ct. R. 14.1(h).

The petitioner is further cautioned as follows: "The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." Sup. Ct. R. 14.4.

Petitioner failed to address in any manner whatsoever his third question presented. There is no argument outlining the reasons why review of this issue should be granted by this Court. In fact, the third question presented, including the cite therein, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1994), is found only on the very first page of the petition. (Petition i).

For this reason, neither Respondent nor this Court is able to address the question in any meaningful manner. Moreover, because the Supreme Court Rules unambiguously prohibit such omissions by Petitioner, there is sufficient reason for this Court to rule that Petitioner has vacated this issue, and to deny Hay's petition with respect to his third question presented.

CONCLUSION

For all of the foregoing reasons, Respondents, Evin W. Evins, Tracye Frye Hopper, Rob McCoy, John Phillips, Bill Read, Marci Senn, Terry Smither, and Jennifer Vest, respectfully request that this Court deny Lucian Hunter Hay's Petition for a Writ of Certiorari. The above-named Respondents agree that the majority decision of the Sixth Circuit Court of Appeals, affirming the district court's dismissal of Petitioner's action, should be affirmed.

Respectfully submitted,

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